SUPREME COURT, U. S.

JUL 28 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 431

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

JACOB JOHN PFEIFER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
HOW FEDERAL QUESTIONS ARE PRESENTED 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT 3
REASONS FOR GRANTING THE WRIT 7
1. There was an absence of evidence to support the judgment below and this constituted a denial to the petitioner of due process of law 7
2. The course and conduct of the trial below deprived petitioner of property without due process of law 12
3. The course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to the petitioner the equal protection of the laws 13
4. The judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process of law 15
5. The Court below applied principles of law and evidence having the effect of impairing the obligations of contract in violation of Article One, Section 10, of the Constitution of the United States 16
CONCLUSION 17
APPENDIX A – Opinion of the Court of Appeals of Maryland 19
APPENDIX B – Order of the Circuit Court for Prince George's County, Maryland 29
APPENDIX C – Constitution of Maryland, Article 23 30

CITATIONS

CASES

American Federation of Labor v. Swing (1941), 312 U.S. 715, 85 L.Ed. 855, 61 S. Ct. 468, *rehearing denied*, 312 U.S. 715, 85 L. Ed. 1145, 61 S. Ct. 735 11

Bell v. Hood (1946), 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 14

Betts v. Brady (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 12

Blackburn v. Alabama (1960), 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274 11

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 12

Bright v. State (1944), 38 A.2d 96, 183 Md. 308 15

Carozza v. Federal Finance and Credit Co. (1925), 131 A. 332, 169 Md. 223 14

Chicago L. Ins. Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492 12

Douglas Park Jockey Club v. Grainger (1906 CC Ky.), 146 F. 414, *rev'd on other grounds*, 148 F. 513 (C.A. 6th) 11

Harvard Sports Daily v. Weller (1941), 18 A.2d 210, 179 Md. 355 13

Nationwide Mut. Ins. Co. v. McBriety, 230 A.2d 81 14

Re Trusteeship of Kenan, 99 A.L.R.2d 934, 261 N.C. 1, 134 S.E.2d 85 13

Slansky v. State (1949), 63 A.2d 599, 192 Md. 94 15

Thompson v. Louisville (1960), 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 ..... 11, 12

STATUTES

Article 1, Section 10, Constitution of the United States 3, 16

Maryland Constitution Declaration of Rights, Art. 23 ..... 2, 3, 15

Maryland Code (1964 Replacement Volume 5), Art. 48A, sec. 374 3

TEXT

Corpus Juris Secundum, Constitutional Law sec. 575 11

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CONTINENTAL CASUALTY COMPANY,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on May 13, 1967.

OPINIONS BELOW

The opinion of the Circuit Court for Prince George's County, Maryland is unreported and is printed in appendix B hereto, *infra* p. 29. The opinion of the Court of Appeals

of Maryland, printed in appendix A hereto, *infra* p. 19, is reported at __ Md. __, 229 A.2d 422.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 11, 1967 (R. 1). Timely motion for reargument was denied on June 13, 1967. (R. 15) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3), since it is contended that the action of the State Court is in violation of the due process and equal protection clause of the Fourteenth Amendment as well as Article 1, § 10 of the Constitution of the United States.

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions as to the denial of due process and judicial impairment of contract were raised in the motion for reargument filed in the Court of Appeals of Maryland on June 13, 1967. (R. 15) The federal question of violation of the equal protection clause is raised herein for the first time. The decision of the highest State Court, *infra* p. 19, affirming the lower Court, was completely unexpected and unanticipated.

QUESTIONS PRESENTED

1. Whether there was such absence of evidence to support the judgment below as to constitute a denial to the petitioner of due process of law.

2. Whether the course and conduct of the trial below deprived petitioner of property without due process of law.

3. Whether the course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to petitioner the equal protection of the laws.

4. Whether the judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process, impairment of the obligations of contract and equal protection.

5. Whether the Court below applied principles of law and

evidence having the effect of impairing the obligations of contract in violation of Article 1, § 10 of the Constitution of the United States.

STATUTES INVOLVED

The pertinent statutory provisions involved are the Maryland Code (1964 Replacement Volume 5) Article 48A, § 374 —relevant portions of which are printed as part of the Court of Appeals of Maryland opinion, pages 25-26, *infra*—and the Maryland Constitution Declaration of Rights, Article 23, Appendix C, *infra* p. 30.

STATEMENT

Dr. Jacob John Pfeifer, respondent, filed a declaration on October 18, 1965 in the Circuit Court for Prince George's County, Maryland seeking a declaratory judgment and alleging that on May 26, 1963, he sustained an injury to his right hand, which injury constituted a total disability and was permanent in nature, thus entitling him to receive $750 per month beginning May 26, 1964 under the provisions of Petitioner's Group Policy and Certificate (E. 5)*

On November 30, 1965, petitioner filed a plea denying the allegations of the respondent's declaration (E. 1). The basis of the denial was that the respondent was ineligible for coverage in accordance with the terms of the insurance contract and additionally that he had made material false representation in his contract application in that he was suffering from a Colles' fracture of the left wrist at the time he signed the application; his wrist was in a cast; he was taking codeine for pain; he was drawing disability compensation, etc.

At the trial on May 10, 1966, the seventy-seven year old respondent testified (E. 21-44). The respondent introduced the petitioner's group insurance policy (E. 98), and respondent's attorney read into evidence certain portions of the pol-

*Designation "E." refers to pages of joint record extract in Court of Appeals of Maryland.

icy pertaining to "Eligible Members" (E. 27) showing that by the terms of the insurance contract, applicants were not eligible if they were temporarily unemployed or temporarily absent from the full-time duties of their occupation by reason of sickness or injury.

On cross-examination and recross of respondent (E. 45-60, 65), he admitted that on January 29, 1963, the date he signed the application for insurance coverage (E. 182-183), which he knew to be a part of the insurance contract (E. 57), he had answered "yes" to questions on the insurance application as follows:

> "No. 3 Are you now to the best of your knowledge and belief in good health and free from any physical impairment?
>
> "No. 5 Are you now actively engaged in your occupation on a full-time basis?" (E. 50)

Cross-examination of respondent (plaintiff below) showed that respondent had broken his left wrist, a Colles' fracture, on December 31, 1962 (E. 48), some twenty-nine days before he signed the insurance contract applications on January 29, 1963; that he was operated on under general anesthesia for the fracture and a cast placed thereon (E. 48-49); that at the time of his signing the insurance application he was carried on the rolls of the U. S. Public Health Service as "not fit for duty" and that on April 1, 1963, two months after the date of the insurance application, he was receiving codeine for pain (E. 54, 187); additionally the cross-examination of respondent indicated that he was:

1. Retired from the Veterans Administration as a medical doctor on December 14, 1954 (E. 45).

2. Drawing disability compensation at time of trial from the Veterans Administration and had been drawing it since 1946-47 (E. 45).

3. Suffering from a physical impairment in that one leg was an inch and one-quarter shorter than the other (E. 46-47).

4. Not engaged in the practice of medicine in Maryland and had no office there in his home or elsewhere (E. 47).

5. Not under any contract for future employment with anyone or any company at the time he signed the insurance contract application (E. 47).

6. The person under the care of Doctor Bertram Weisbaum whose report indicated that respondent was not fit for duty on March 28, 1963 and that the said doctor made an entry on his record on March 5, 1963 as follows:

> "Patient is now two months post left Colles' fracture. He has been having difficulty with persistent aching in the dorsum of the wrist. Examination reveals marked limitation of flection and extension of the wrist. Internal rotation is fairly good; however, external rotation is markedly limited. The patient is also noted to have stiffness of the fingers with limited flection, so that the finger tips can reach only within approximately three-quarters inch of the palm. There appears to be some diffuse atrophy of the hand as well, probably from disuse. The patient is not fit for duty. He is referred to the Washington Public Health Service Out-patient Clinic for physical therapy—whirlpool, paraffin baths and active exercises. He is to return on March 28, 1963." (E. 55)

7. Aware that he was disabled at the time he signed the insurance application but did not think it made any difference (E. 65).

The above evidence is uncontradicted except by the respondent's own testimony that he did not think it important.

Respondent's medical witness testified that a Colles' fracture of the left wrist sustained by respondent on December 31, 1962, and for which he was still under treatment when he signed the insurance application on January 29, 1963, was considered a serious fracture (E. 71).

At the close of respondent's case (plaintiff below), petitioner moved for a directed verdict (E. 9-15, 78). Motion

was denied by the trial court. Petitioner then introduced contract application and medical records not introduced by respondent (E. 182, 290), and renewed motion for a directed verdict (E. 79), which was denied.

Special issues submitted by petitioner to the Court were denied by the Judge in chambers. The Judge prepared special issues which were given to the jury (E. 80-84), including the following:

> ". . . if a person answers a question on an application for an insurance policy, and he is not acting in bad faith—if he answers that incorrectly and not acting in bad faith and doesn't intend to deceive, and doesn't think it's of any importance and doesn't think the answer makes any difference and he doesn't know or have reason to believe that that would make any difference in the insurance company assuming the risk and writing the policy, then that falls into a different category legally than someone who deliberately makes it with the idea of deceiving the insurance company so they will write the policy and assume the risk which they otherwise would not assume for the amount of the premium they are getting if they knew about this particular fact" (E. 84).

The jury answered the special issues and were discharged (E. 86-87). On May 10, 1966, judgment was entered in favor of the respondent in the amount of Eighteen Thousand, Two Hundred, Thirty-nine ($18,239.00) Dollars, with interest from May 10, 1966 and declaratory judgment in accordance with the order of May 13, 1966. Judgment absolute was entered May 13, 1966 (Appendix B, page 29, *infra.)*

Petitioner appealed to the Court of Appeals of Maryland on May 16, 1966.

Briefs were filed and oral argument heard before the Court of Appeals of Maryland, on April 13, 1967. On May 11, 1967, the Court of Appeals affirmed the judgment and order of the Circuit Court (Appendix A, page 19, *infra*). On June 9, 1967, petitioner filed motion for reargument (R. 15). On

June 13, 1967, motion for reargument was denied and the opinion modified (R. 1, 15). This petition follows.

REASONS FOR GRANTING THE WRIT

1. There was an absence of evidence to support the judgment below and this constituted a denial to the petitioner of due process of law.

There are two major contentions of the petitioner. First, the uncontroverted evidence establishes beyond question that the respondent was, by the terms of the insurance contract itself, clearly ineligible for the coverage by the terms of the insurance contract because he was temporarily unemployed or temporarily absent from the full time duties of his occupation for reasons of sickness or injury (E. 27). The evidence shows that this fact was established, without contradiction, by the medical records, respondent's own testimony, and that of his medical witness (E. 45-49, 55, 71). There is no evidence to support the view that respondent could have been within the terms of the insurance policy contract which was received by him prior to his answering the questions on the application for insurance. The second major contention of the petitioner is that the uncontroverted evidence establishes the falsity and materiality of respondent's answer to question three of the insurance contract application (E. 45-50, 54, 57, 65, 71, 121). There is no evidence tending to show that the respondent did not give a false answer on the application for insurance to a question that was material to the issuance of a contract of insurance.

The evidence supporting these two major contentions of the petitioner that the respondent was ineligible for the coverage requested and gave false and material answers in his insurance contract application is summarized together as follows:

(a) The insurance contract states with regard to "eligible members":

"Eligible members wherever used in this policy means a member who is not a full-time member of the armed services of any country, *who is not retired* and who is *actively performing the full-time duties of his occupation.* Provided that a Member who is temporarily unemployed or temporarily absent from the full-time duties of his occupation for *reasons other than sickness or injury* shall nevertheless be deemed to be actively performing the full-time duties of his occupation." (emphasis supplied) (E. 99)

It is submitted that there is no question but that an applicant who was temporarily absent from the full-time duties of his occupation by reason of sickness or injury, was clearly ineligible.

(b) Questions 3 and 5 of the insurance application, both answered by the respondent in the affirmative, are as follows:

3. Are you now to the best of your knowledge and belief in good health and free from any physical impairment?

5. Are you now actively engaged in your occupation on a full-time basis?

(c) The respondent, Jacob John Pfeifer, testified as follows: that he had fallen on the ice outside his home on December 31, 1962 and had sustained a broken left wrist, referred to as a colle's fracture, for which he was hospitalized, given general anesthesia, and a cast was applied; that he was under treatment at the time he signed the insurance contract application on January 29, 1963 (E. 48-50); that he had retired from the Veterans Administration on December 14, 1954 (E. 45); that he was drawing disability compensation at the time of trial and had been since 1946-47 (R. 45); that he was suffering from a physical impairment in that one leg was an inch and one-quarter shorter than the other for which he wore built up shoes (E. 46-47); that he was not engaged in the practice of medicine in Maryland

and had no office in his home or elsewhere (E. 47); that he was not under contract for any future employment with anyone or any company at the time he signed the insurance application (E. 47); that he was the person who signed the insurance application on January 29, 1963 stating that that he was, at that time, actively engaged in his occupation on a full-time basis and that he was in good health and free from any physical impairment or disease (E. 50); that he was the person under the care of Doctor Bertram Weisbaum whose report indicated that he was still not fit for duty on March 28, 1963 and that this Doctor made an entry in his record on March 5, 1963 as follows:

> "Patient is now two months post left colle's fracture. He has been having difficulty with persistent aching in the dorsum of the wrist. Examination reveals marked limitation of flection and extension of the wrist. Internal rotation is fairly good; however, external rotation is markedly limited. The patient is also noted to have stiffness of the fingers with limited flections, so that the finger tips can reach only within approximately three-quarters inch of the palm. There appears to be some diffuse atrophy of the hand as well, probably from disuse. The patient is not fit for duty. He is referred to the Washington Public Health Service Out-Patient Clinic for physical therapy—whirlpool, paraffin baths and active exercises. He is to return on March 28, 1963" (E. 55);

that he (respondent) was aware that the insurance application he signed on January 29, 1963 was a part of the insurance contract (E. 57); and that he was aware that he was disabled at the time he signed the insurance application, though he claimed on the witness stand that at that time he did not think it made any difference that he gave an answer that falsely represented his true physical condition (E. 65).

None of the foregoing evidence was contradicted in any manner. On the contrary, the respondent's own medical witness testified that a colle's fracture of the left wrist such as that sustained by respondent was a serious one (E. 71).

How was this evidence reflected in the opinion of the Court of Appeals of Maryland? (Appendix A, *infra*) On page 2 of the opinion, the Court quoted the definition of "eligible member" and thereafter ignored it.

As to the falsity of the answer given by the respondent on the contract application that he was, at the time, in good health and free from any physical impairment, the opinion of the Court of Appeals stated, Appendix A, *infra*, that at the trial the respondent stated that he did not mention the fractured left wrist because some brochure material had led him to believe that it was not necessary and because the left wrist was healing so rapidly. The source of the Court's statement that the wrist was healing so rapidly is not apparent from the record, in view of the entry by Doctor Weisbaum (quoted at p. 9, *supra*) over two months after the respondent broke his left wrist.

The Court of Appeals stated, Appendix A, *infra*, that there was absolutely no evidence that the respondent had permanently withdrawn from his full-time occupation as a ship's doctor. The petitioner disputes this statement but states that regardless, it is of absolutely no significance. The respondent's being not fit for duty on January 29, 1963 and for over three months following the fracture on December 31, 1962 made him clearly ineligible according to the insurance contract. Giving the language of the insurance contract (E. 99) its normal meaning, the respondent was temporarily unable to perform the full-time duties of his occupation by reason of sickness or injury and was thus ineligible for the coverage. The medical records clearly indicate respondent was still unfit for duty almost three months after he signed the application (E. 186-187).

The Court of Appeals states, Appendix A, *infra*, that other than some exhibits and cross-examination of another medical expert, "there was no evidence to support the claim of the insurer that the representation was false and material to the risk." On the basis of the evidence previously summarized, it is submitted that this part of the opinion is not supported by any evidence.

Petitioner submits that a sentence of guilty in a criminal trial, where there was such a total absence of evidence, would be summarily reversed by any reviewing authority.

Although a criminal case, the rule that "no evidence" violates due process was clearly stated by this Court in the case of *Thompson v. Louisville* (1960), 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624. It is submitted that the requirement of due process is, fundamentally, a rule of fairness and the Fourteenth Amendment forbids fundamental unfairness in the use of evidence. *Blackburn v. Alabama* (1960), 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274.

The right to make legal contract of all kinds, without fraud or deception, is both a liberty and a property right within the protection of the Constitutional guaranties against the taking of liberty or property without due process of law. CJS, *Constitutional Law* § 575.

As Professor Warren Seavey said on one occasion when discussing an obviously erroneous decision, there is no explanation for the decision except that the defendant was an insurance company.

It is agreed that mere lack of success in the State courts, does not, alone, show that there has been a violation of the due process guaranty of the Constitution of the United States. However, when the State Court denies to any citizen the equal protection of the law or deprives him of his property without due process of law, the State itself does so and such action comes within the constitutional provision. *Douglas Park Jockey Club v. Grainger* (1906 CC Ky.), 146 F. 414, *rev'd on other grounds* (C.A. 6th), 148 F. 513.

As a matter of substantive constitutional law, there is no doubt that a state court judgment constitutes "state action" within the purview of the due process clause of the Fourteenth Amendment and that such a judgment may, depending upon the circumstances, deprive a litigant of property without due process of law. *American Federation of Labor v. Swing* (1941), 312 U.S. 715, 85 L. Ed. 855, 61 S. Ct.

568, *rehearing denied*, 312 U.S. 715, 85 L. Ed. 1145, 61 S. Ct. 735.

As this Court has stated, an asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady* (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252.

Since there was no evidence to support the judgment of the Court, it is submitted that this amounted to a denial of due process as was clearly stated by this Court in *Thompson v. Louisville*, *supra*.

It has been stated that whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights, *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451; *Chicago L. Ins. Co. v. Cherry*, 244 U.S. 25, 61 L. Ed. 966, 37 S. Ct. 492. It is submitted that the decision of the court in this case is so arbitrary and capricious in the face of no evidence, as to amount to a denial of due process of law.

2. The course and conduct of the trial below deprived petitioner of property without due process of law.

It is submitted that due process of law requires adherence to the adopted and recognized rules of evidence in civil as well as criminal trial and certainly the course and conduct of the procedural aspects of a trial are subject to the requirement of due process. The evidence has already been summarized. The respondent testified that the reason he gave untrue answers on the insurance application was that he did not consider it important (E. 65).

The respondent was the plaintiff below. In the face of all of the evidence, the trial court denied petitioner's motions for a directed verdict at the close of plaintiff's case as well

as at the close of defendant's case. The trial judge in instructing the jury stated, in effect, that even if the answers given were false, they could disregard it as it had no legal significance if they believed the respondent medical doctor did not consider them important (E. 83-84).

The Court of Appeals of Maryland stated in their opinion, Appendix A, *infra*, that the petitioner had introduced no evidence to support their claim that respondent's representation was false or material to the risk other than for some exhibits and the testimony on cross-examination of another medical expert. The materiality of the clearly false representation, by the respondent, on the insurance application, is established by the fact that the policy stated that those persons, even temporarily unemployed or absent from their occupation for reasons of sickness or injury, were ineligible for coverage. The respondent-plaintiff had some burden once the evidence showed that he was clearly ineligible by the terms of the insurance contract and that, by his own admission, he had given false answers on the insurance contract application. The respondent-plaintiff evaded any consequences of his admissions by the mere expedient of saying he did not consider the answers he gave in his own handwriting, as of any importance and the trial court, as well as the Court of Appeals, supported him. The results amounted, it is submitted, to the confiscation of petitioner's property without due process of law. The opinion was harsh, oppressive and discriminatory.

3. The course and conduct of the trial below and the judgment of the Court of Appeals of Maryland denied to the petitioner the equal protection of the laws.

As was held in the case of *Re Trusteeship of Kenan*, 99 A.L.R.2d 934, 261 N.C. 1, 134 S.E.2d 85, the Fourteenth Amendment prohibition against the denial to any person within the jurisdiction of the state of the equal protection of the laws is not confined to the Legislature, but is applicable to Courts. *Harvard Sports Daily v. Weller* (1941), 18 A.2d 210, 179 Md. 355.

A private corporation is a "person" within the meaning of the equal protection clause of the Fourteenth Amendment to the Federal Constitution and is entitled to the equal protection of the laws. *Carozza v. Federal Finance and Credit Co.* (1925), 131 A. 332, 169 Md. 223.

The crux of this case is that by the admission of the respondent, he was clearly not eligible for membership and coverage according to the definition of eligible member in the policy because he was temporarily absent from the full-time duties of his occupation for reasons of sickness or injury. Though completely ignored by the trial court and the Court of Appeals, this was clearly and unequivocally established by all of the evidence. There was not one shred of evidence to refute it in any way. This was not a question of fact in dispute. It was undisputed. This was, it is submitted, not an immaterial or unsubstantial issue, but rather was the key issue in the case. As this Court stated in *Bell v. Hood* (1946), 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773, where the alleged violations of the Constitution pleaded were not immaterial and unsubstantial, but rather formed the sole basis of the relief sought, it could not sustain a dismissal of the cause for want of jurisdiction.

As to the second point, relating to the false representations of respondent on the contract application, substantial, though not as significant as the uncontroverted evidence as to lack of eligibility, Maryland cases uniformly hold that *when bad faith or falsity or materiality is shown by clear and convincing or uncontradicted evidence, the question as to whether a representation is true or false or material to the risk is one for the trial court to decide as a matter of law.* (emphasis supplied) Maryland cases in support of this proposition are contained in the opinion of the Court of Appeals of Maryland, Appendix B, *infra.* In the recent 1967 Maryland case of *Nationwide Mut. Ins. Co. v. McBriety*, 230 A.2d 81, the Court held that material misrepresentation by applicant for life insurance, in reliance upon which policy is issued, voids the policy, *regardless of whether misrepresen-*

tation was made intentionally or through mistake and in good faith, because it results in assumption by insurer of a risk different from that which applicant led it to suppose it was assuming.

The failure of the court to consider the undisputed evidence previously summarized, it is submitted, constituted a denial of equal protection of the laws to the petitioner.

4. The judgment below is in violation of the Maryland Constitution Declaration of Rights, Article 23, dealing with due process of law.

The insurance contract clearly stated that a person is ineligible for coverage if at the time he signs the application he is temporarily absent from the full-time duties of his profession for reasons of sickness or injury (E. 99). The evidence was overwhelming and uncontradicted that the respondent was carried on the rolls of the Public Health Service as "not fit for duty" for over two months after he signed the insurance application (E. 186-87). His considerable difficulties and pain were fully recorded by his Doctor Weisbaum on March 5, 1963 (E. 55). This evidence was completely ignored by the trial court and although the definition of "eligible member" was noted by the Court of Appeals in their opinion, Appendix A, *infra*; they likewise failed to consider it thereafter.

Due process of law requires essential fairness and justice in judicial proceedings. *Slansky v. State* (1949), 63 A.2d 599, 192 Md. 94. It is submitted that if "due process" is a rule of fairness, it was violated in every essential in the courts below. As the Maryland court stated in *Bright v. State* (1944), 38 A.2d 96, 183 Md. 308, the object of the Federal and State Constitutional Provision with respect to due process of law is to declare and secure to people their pre-existing rights as established by usage and the settled course of law.

Article One, Section 10, of the Constitution of the United States provides that no state shall pass any law impairing

the obligations of contract and *the Courts cannot apply principles which would have the effect of impairing a contract.* (emphasis supplied) *Watkins v. Worthington* (1830), 2 Bland 509.

The Court below, in failing to consider the uncontroverted evidence as to respondent's ineligibility as well as the false and material representations admitted by the respondent, applied principles in violation of the Federal Constitution as well as that of the State of Maryland.

5. The Court below applied principles of law and evidence having the effect of impairing the obligations of contract in violation of Article One, Section 10, of the Constitution of the United States.

There was no ambiguity shown in the terms of the contract of insurance. The definition of "eligible member" in the policy was quoted without comment by the Court of Appeals of Maryland in their opinion, Appendix A, *infra.* The evidence was not controverted that by the terms of the contract a person temporarily absent from full-time employment in his profession for reasons of sickness or injury was ineligible for coverage. The evidence was likewise overwhelming that the respondent, when he signed the contract application on January 29, 1963, was not fit for duty then and for some two months thereafter. Additionally, by his own admission, he had no office or contract for any future employment.

The Court of Appeals ignored all of the evidence and stated "the court could have directed a verdict in favor of the insured under Plan C . . .". Appendix A, *infra.* The petitioner, in the upper left hand corner of the application, states "The Company reserves the right to limit impaired risks to the benefits obtainable under Plan C in table at right." (E. 96) However, this coverage was only available in the event the applicant was eligible. Here all of the evidence was that he was ineligible. Obviously, the Court of

Appeals considered a contract that might have been entered into between respondent and petitioner, had he been eligible, but was not.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari to the Court of Appeals of Maryland be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND
September Term, 1966

No. 341

CONTINENTAL CASUALTY COMPANY

v.

JACOB JOHN PFEIFER

Hammond, C.J.
Horney
Oppenheimer
Barnes
Finan,
JJ.

Opinion by Horney, J.

[Filed: May 11, 1967]

When the Continental Casualty Company (the insurer) disclaimed coverage under the certificate issued to Dr. Jacob John Pfeifer (the insured) under a group disability indemnity policy, he brought this action for a declaratory judgment stating his entitlement to the benefits specified in the policy and certificate and for an order requiring the insurer to pay the monthly payments then due and thereafter to become due in accordance with the terms of the policy and certificate. The insurer defended the claim for benefits on the premise that the insured made material misrepresentations as to his good health, his freedom from physical impairment

and his full-time practice of medicine at the time he signed the application for insurance. At the conclusion of the trial, the case was submitted to the jury on special issues, and the answers to those which called for an answer being favorable to the insured, the trial court directed the entry of a judgment *nisi* for $18,239 and ordered payment of $750 per month "to continue and to be terminable only according to the terms" of the group policy and certificate of insurance. When the judgment became absolute, the insurer appealed to this Court. The questions on appeal concern the sufficiency of the evidence and the propriety of the special issues submitted to the jury and the instructions of the court with respect thereto.

On several prior occasions before he decided to apply for the insurance, the doctor had received a brochure from the insurer informing him that, if he was an eligible member of the American Medical Association and applied for coverage on or before a specified date, he could enroll, irrespective of his age, his past medical history and his present physical condition, in a group disability indemnity plan, under which he would be paid monthly benefits—of $1000 under Plan A, $750 under Plan B and $500 under Plan C—in case he should become totally disabled as the result of an injury arising out of an accident, subject only to the right of the insurer to limit the obtainable benefits to Plan C for certain impaired risks.

The doctor, before the offer expired, applied for insurance under Plan B believing, from what he had read in the brochure, that such disabilities as he had at the time would not affect the payment of benefits he would be entitled to receive should he become totally disabled. The schedule of definitions in the certificate defined an "eligible member" as one "who is not retired and who is actively performing the full-time duties of his occupation" coupled with a proviso that a member "who is temporarily unemployed or temporarily absent from the full-time duties of his occupation for reasons other than sickness or injury shall neverthe-

less be deemed to be actively performing the full-time duties of his occupation." "Retired" was defined as the "permanent withdrawal from the pursuit of a full-time gainful occupation." "Injury" was defined as "bodily injury caused by an accident." The term "total disability" was described as that "which wholly and continuously prevents the insured from performing the duties of his occupation and which requires care and attendance of a currently licensed physician or surgeon other than the insured." And "regular care and attendance" was said to mean "observation and treatment to the extent necessary under existing standards of medical practice for the condition causing total disability."

The certificate of insurance was issued pursuant to an application completed and signed by the doctor. It contained several pertinent questions. Two of them—"Are you now actively engaged in your occupation on a full time basis?" and "Are you now to the best of your knowledge and belief in good health and free from any physical impairment or disease?"—both of which were answered in the affirmative, are the ones which gave rise to the controversy.

Less than four months after February 15, 1963, the effective date of the coverage, the doctor sustained an injury as the result of a fall on board the ship on which he was then employed as the ship's doctor, for which he subsequently claimed the benefits afforded by the policy. The payments of benefits were to begin on May 25, 1964, one year after the date of the accident, but no payments were ever made. Seven months later, when the insurer disclaimed coverage on the ground that the doctor was not engaged in full-time practice of medicine at the time of the injury and tendered return of the premiums that had been paid, the insured brought this suit. Later, the insurer also disclaimed liability on the ground that the doctor did not disclose in the application that he had a fractured left wrist at the time he answered the question in the application concerning physical impairments.

Although he left the Veterans Administration in August

of 1954, the doctor, instead of retiring from the practice of medicine, signed up with several ship companies as a ship's doctor. Beginning in April of 1955 and continuing through May of 1963, he made sixty-two trips aboard ship. Normally, the sailings were interspersed with shore leaves of varying lengths. After a voyage which terminated in December of 1962, he sustained a Colles's fracture of his left wrist. Apparently he decided while he was recovering from that injury that he needed the disability insurance and he applied for it on January 29, 1963. His wrist was still in a cast when he applied for the insurance, but it was removed nine days later. Although he was of the opinion that had he then been called, he could have gone on duty aboard a ship, the Public Health Department did not note his fitness for duty until the middle of April of 1963. About a week later, when he received what was destined to be his last call to take a ship, the insured was examined by the medical doctor of the American Export Isbrandtsen Lines and was found to be fit for duty before he was accepted. On board the ship, the insured attended to his duties as the ship's doctor until he was injured on May 26, 1963. The injury sustained on this occasion was a Colles's fracture of the *right* wrist, which, unlike the first injury, permanently disabled him.

At the trial, the insured stated that he did not mention the fractured left wrist in the application because the brochure had led him to believe that it was not necessary and because the wrist was rapidly healing without complications. And, so far as he was aware, there were no other ailments. One leg was shorter than the other and he had previously received compensation for the inflamation of a bursa which had cleared up. Neither condition affected his ability to perform the duties of a medical doctor at the time he applied for the insurance.

As a qualified medical expert, the insured testified in his own behalf as to the permanence of the injury last incurred, and his testimony was corroborated by that of another medical expert. The insured was not deemed to be fit for active

duty as of his last treatment at the Public Health Hospital in April 1965 and the prognosis, according to the medical records, was that his condition would remain the same with the same symptoms. And he was to receive no further treatments.

When the insurer moved for a directed verdict at the end of the insured's case and at the conclusion of its own case on the grounds that the insured was not engaged in the active practice of medicine, that he was physically disabled at the time of the application and that the fractured right wrist had not totally disabled him, the motions were denied. The special issues the insurer had prepared for submission to the jury were also refused and the court, in lieu thereof, submitted to the jury the special issues it had formulated along with its instructions as to the law. There were no objections or exceptions to any of these proceedings.

The jury, in answering the special issues submitted by the court, found that the insured *was not* retired under the policy definition; that the insured *was* totally disabled by the accident of May 26, 1963; that the insured was still disabled at the time of trial; and that the insured *did not* know or believe that he was making intentionally false statements which were material to the risk.

On appeal the insurer, claiming that there was no evidence from which the jury could find that the insured was not retired, that he was totally disabled and that he had not intentionally made false statements which were material to the risk, contends that the trial court should have ruled as a matter of law that the insured was not entitled to the benefits provided by the insurance. It is also contended that the court erred in refusing to submit the special issues requested by the insurer and in giving the instructions with respect to the special issues the court prepared and submitted to the jury.

The insurer, evidently on the supposition that the insured had neither an office for the practice of medicine nor a present or future prospect of employment as a doctor at the

time he applied for disability insurance, contends that the insured was retired and that it was therefore entitled to a directed verdict. We do not agree. Not only does the argument ignore the fact that the insured was then on shore leave with a rapidly healing fractured left wrist and the further fact that the insured, at least in his own opinion, was then able to resume his duties aboard ship as a doctor, but overlooks the further fact that the policy defined the word "retired" as the permanent withdrawal from the full-time practice of medicine. The term "full-time" means the amount of time considered customary and standard. According to the record there was absolutely no evidence that the insured had permanently withdrawn from his full-time occupation as a ship's doctor. On the contrary there was ample evidence from which the jury could find, as it did, that the insured was not retired. Time after time we have held that in ruling on a motion for a directed verdict the facts should be considered in the light most favorable to the plaintiff and that the direction of a verdict in favor of a defendant is not justified if there is any evidence, however slight, legally sufficient to prove the plaintiff's case. *Stein v. Overlook Joint Venture*, ___ Md. ___, 227 A.2d 226 (1967); *Wood v. Johnson*, 242 Md. 446, 219 A.2d 231 (1966).

Next, the insurer, apparently because the insured had received no regular care and attendance for or on account of the Colles's fracture he sustained to his right wrist from the date of his last treatment at the hospital to the date of trial, contends that the insured was not totally disabled and for that reason it was entitled to a directed verdict. Again we disagree. Although "total disability" is defined as that which requires the regular care and attendance of a physician other than the insured as well as that which prevents the insured from performing his duties as a doctor, the policy also defines regular care and attendance as such treatment as is necessary for the condition which caused the disability. As to this, the record indicates, and there is no evidence to the contrary, that when the insured was last treated for the fractured right wrist at the hospital in the latter part

of April 1965, the doctors concluded, since his symptoms were unchanged and were unlikely to change, that his disability was permanent in nature and that further treatments would avail nothing. Under these circumstances, despite the fact that there was some evidence to the effect that the insured could practice some kinds of medicine, though not on board ship, and that some doctors engaged in practice with more serious disabilities than those of the insured, we think the case was properly submitted to the jury on this issue. There was adequate evidence from which the jury could find, as it did, that the insured was totally disabled by the injury he received and that such condition had not thereafter changed. See *Stein v. Overlook Joint Venture* and *Wood v. Johnson*, both *supra*.

Lastly, the insurer contends that its motions for a directed verdict should have been granted because the statements of the insured were, as a matter of law, false and material to the risk. Neither the cases nor the statute supports the contention.

Code (1964 Replacement Volume 5), Article 48A, § 374, provides in pertinent part:

> "All statements and descriptions in any application for a * * * health insurance[1] policy, * * * by or on behalf of the insured * * *, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under such policy or contract unless either:
>
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would * * * not have issued * * * the policy or contract, or would not have issued a policy or contract in as large an

---

[1] Among other things, "Health Insurance" is defined by § 66 of Article 48A as "insurance of human beings against bodily injury, disablement, or death by accident or accidental means."

> amount, or at the same premium or rate, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

While this Court, regardless of whether they were made in good or bad faith, has consistently recognized that the statements or representations of an applicant for insurance,[2] which are material either to the acceptance of the risk or the hazard assumed, can have the effect of voiding the policy of insurance, it has also held that an untrue statement does not nullify the policy of insurance unless the representation was made in bad faith or is related to a matter material to the risk or hazard undertaken. *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26 (1861); *Mutual Benefit Life Ins. Co. v. Wise*, 34 Md. 582 (1871); *Schloss v. Metropolitan Life Ins. Co.*, 177 Md. 191, 9 A.2d 244 (1939) and the earlier cases cited therein. Also see the more recent cases of *Silberstein v. Mass. Mutual Life Ins. Co.* 189 Md. 182, 55 A.2d 334 (1947); *Baker v. Continental Cas. Co.*, 201 Md. 464, 94 A.2d 454 (1953); *John Hancock Mutual Life Ins. Co. v. Adams*, 205 Md. 213, 107 A.2d 111 (1954); *Monumental Life Ins. Co. v. Taylor*, 212 Md. 202, 129 A.2d 103 (1957).

Also, as was said in *Commercial Cas. Ins. Co. v. Schmidt*, 166 Md. 562, 568-569, 171 Atl. 725, 728 (1934), as well as in *Schloss* (at p. 198) and *Taylor* (at p. 213), both *supra*, "[t]he question of materiality is not exactly whether disability of any sort is proved to have existed at the time of making the application, but whether the misrepresentation of the true facts would reasonably have affected the determination of the acceptability of the risk."[3] See also *Lov-*

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[2] In this respect, the courts, in construing contracts of insurance, make no distinction between fire, life, health, accident and other kinds of insurance. See American Casualty Co. v. Purcella, 163 Md. 434; Hankins v. Pub. Ser. Mut. Ins. Co., 192 Md. 68.

[3] Also see Silberstein v. Mass. Mutual Life Ins. Co., 189 Md. 182 and John Hancock Mutual Life Ins. Co. v. Adams, 205 Md. 213.

ing v. Mutual Life Ins. Co., 140 Md. 173, 117 Atl. 323 (1922).

The question in the instant case, however, is whether the issue of materiality should have been determined by the jury or by the court. As to this, the cases uniformly hold that when bad faith or falsity or materiality is shown by clear and convincing or uncontradicted evidence, the question as to whether a representation is true or false or material to the risk is one for the trial court to decide as a matter of law, but when there is a conflict in the evidence, or the evidence is doubtful, the question is one for the jury to determine as the trier of fact. See *Monumental Life Ins. Co. v. Taylor, Baker v. Continental Cas. Co.*, and *Schloss v. Metropolitan Life Ins. Co.*, all *supra*. Also see *Heidenreich v. Metropolitan Life Ins. Co.*, 213 Md. 286, 131 A.2d 914 (1957); *Union Trust Co. v. Kansas City Life Ins. Co.*, 300 F.2d 606 (4th Cir. 1962).

The insurer defended this case on the theory that the insured had made material misrepresentations as to his health, freedom from physical impairment and full-time practice of medicine, but, other than some of the exhibits and the testimony on cross-examination of another medical expert—whose testimony, although corroborating that of the insured doctor, was not unfavorable to the insurer in some respects—there was no evidence to support the claim of the insurer that the representation was false and material to the risk. At most, it is apparent that the only effect of such adverse evidence as was produced would have been to cast some doubt on the otherwise clear and convincing testimony of the insured.

We think the court, in applying the law to the facts, properly submitted the case to the jury on this issue. There was much evidence from which the jury could reasonably find that the insured had not intentionally made false statements which were material to the risk. Indeed, as the insurer had limited the payment of benefits on impaired risks to $500 a month, the court could have directed a verdict in favor

of the insured under Plan C and submitted to the jury a question only as to the liability of the insurer for additional payments of $250 a month under Plan B.

Due to the failure of the insurer, in conformity with Maryland Rules 560 b and 554 d and e, to make timely objections or exceptions to the adverse rulings of the trial court with respect to a directed verdict, the special issues prepared by itself and the instructions of the court to the jury, we do not reach the remaining questions presented by the appeal.

JUDGMENT AND ORDER OF COURT AFFIRMED; APPELLANT TO PAY THE COSTS.

APPENDIX B

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND (Ralph W. Powers, Judge)

THIS case having come before the Circuit Court for Prince George's County, Maryland on May 10, 1966 for trial before a jury, and the jury having returned its answers on the special issues raised therein, it is, by the Court, this 13th day of May, 1966

ORDERED that judgment nisi be entered as of May 10, 1966 for the Plaintiff for the sum of Eighteen Thousand Two Hundred Thirty Nine ($18,239.00) Dollars, with interest from May 10, 1966, and it is further

ORDERED that it be and hereby is declared that the Defendant pay to the Plaintiff the sum of Seven Hundred Fifty ($750.00) Dollars on the 26th day of May, 1966, and on the 26th day of each succeeding month, said payments to continue and to be terminable only according to the terms of the above named Group Policy.

APPENDIX C

CONSTITUTION OF MARYLAND

Article 23. Due Process

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

SUPREME COURT, U. S.

FILED

AUG 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 431

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

JACOB JOHN PFEIFER,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

SASSCER, CLAGETT, POWERS & CHANNING

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TABLE OF CONTENTS

OFFICIAL AND UNOFFICIAL REPORTS 1

GROUNDS ON WHICH JURISDICTION IS INVOKED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF CASE 3

ARGUMENT:

I. The Supreme Court has no jurisdiction to grant a petition for writ of certiorari,

(1) where no federal question was presented or passed on below until the motion for re-argument (a) was filed after decision of the appeal to the highest Maryland court, (b) and was denied without opinion or further hearing;

(2) where resolution of the federal question then set forth was entirely unnecessary to the Maryland decision and was never passed on;

(3) and where the presentation of the same question, whatever its legal or factual basis, could have been made at the jury trial, at a motion for new trial or motion for judgment *non obstante verdicto*, or even on appeal prior to decision by the highest Maryland court 5

II. Assuming *arguendo* that the Supreme Court has jurisdiction to grant certiorari, certiorari should be denied where the judgment of the trial court was completely supported by the record in accordance with the established Maryland common law and statutory law, none of which is here attacked, constitutionally or otherwise 9

CONCLUSION 9

APPENDIX I – Addenda to Joint Record Extract 10

TABLE OF CASES

American Surety Company v. Baldwin, 287 U.S. 156, 7 L.ed. 231, 53 S.Ct. 98 (1932) 6

Black v. Cutter Labs, 351 U.S. 292, 100 L.ed. 1188, 76 S. Ct. 825 8

Durley v. Mayo, 351 U.S. 277, 100 L.ed. 1178, 76 S.Ct. 806 8

Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.ed. 360, 53 S.Ct. 145 (1932) 7

Herndon v. Gee, 295 U.S. 441, 79 L.ed. 1530, 55 S.Ct. 145 (1935) 7

Lynch v. New York, 293 U.S. 52, 79 L.ed. 191, 55 S.Ct. 16 ... 8

McGoldrick v. Gulf Oil Corporation, 309 U.S. 2, 84 L.ed. 536, 60 S.Ct. 375, vacated on re-hearing in 309 U.S. 692, 84 L.ed. 1034, 60 S.Ct. 512 8

Radio Station WOW v. Johnson, 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475 (1945) 8

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OFFICIAL AND UNOFFICIAL REPORTS

The Order to Enter Judgment in the Circuit Court for Prince George's County, Maryland, is unreported and is not an opinion, but merely an order to the Clerk to enter judgment. The Opinion of the Court of Appeals of Maryland is reported at 246 Maryland 628, 229 A.2d 422 (May 11, 1967).

GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondent presents to this Court that there is no jurisdiction for granting a petition for writ of certiorari in this case, as all of the questions presented by petition in its petition are questions presented here for the first time or in support of petitioner's Motion for Re-Hearing after decision by the highest Maryland State Court. Respondent's position is presented in the Argument following.

CONSTITUTIONAL PROVISIONS INVOLVED

It is evidenced from the petition that petitioner places varying degrees of reliance on the due process clause, the judicial impairment of contract clause, and the equal protection clause. It is respondent's position, however, that no constitutional provision is properly before this Court.

QUESTIONS PRESENTED

I – Does the Supreme Court of the United States have jurisdiction to grant a petition for writ of certiorari,

(1) where no Federal question was presented or passed on below until the Motion for Re-Argument

(a) was filed after decision of the appeal to the highest Maryland court, and

(b) was denied without opinion or further hearing.

(2) Where resolution of the Federal question then set forth was entirely unnecessary to the Maryland decision and was never passed on;

(3) and where the presentation of the same question, whatever its legal or factual basis, could have been made at the jury trial, at a motion for new trial, at a motion for judgment *non obstante verdicto*, or even on appeal prior to decision by the highest Maryland court.

II – Assuming *arguendo* that the Supreme Court has jurisdiction to grant certiorari, should certiorari be granted where

the judgment of the trial court was completely supported by the record in accordance with established Maryland common law and statutory law, none of which is here attacked, constitutionally or otherwise.

STATEMENT OF THE CASE

Dr. Jacob John Pfeifer, respondent, filed a declaration on October 18, 1965 in the Circuit Court for Prince George's County, Maryland, seeking a declaratory judgment (E. 5).[1]

On November 30, 1965, petitioner filed a responsive pleading placing the case at issue (E. 1).

The case came on for trial before a jury on May 10, 1966 (E. 3).

At the close of respondent's case (plaintiff below), petitioner moved for a directed verdict (E. 3, 9-15, 78). The motion was denied by the trial court.

At the close of all of the evidence, the petitioner renewed its motion for directed verdict (E. 3, 79), which was denied (E. 79). The trial court presented special issues to the jury (E. 80-84) to which petitioner did not except (E. 85-86).

The jury answered the special issues favorably to the respondent (E. 86-87), after which the trial court passed an order for entry of judgment in favor of the respondent. (Petition, appendix B)

After judgment nisi was entered on May 10, 1966, judgment absolute was entered on May 16, 1966. Petitioner filed no motion for new trial nor for judgment *non obstante verdicto.*

After judgment absolute was entered, petitioner appealed to the Court of Appeals of Maryland on May 16, 1966. The appeal came on for argument on April 13, 1967. On May 11, 1967, the Court of Appeals of Maryland affirmed the

[1] Designation "E" refers to pages of Joint Record Extract in the Court of Appeals of Maryland which, pursuant to Supreme Court Rule 21(4), have been filed by petitioner with the Supreme Court Clerk's office.

judgment and order of the circuit court (Appendix A, pages 19-28, *infra*).

Petitioner's subsequent motion for re-argument was denied on June 13, 1967 without hearing and without opinion.

Petitioner's petition follows from the decision of the Maryland Court of Appeals.

The factual record developed at the trial below is fairly complex, and is well summarized in the opinion of the Maryland Court of Appeals (Petition, Appendix A), with one addition. There was no communication between the medical doctor of the American Export Isbrandtsen Lines and Dr. Pfeifer about his injury to his left wrist or anything else, between his next-to-last trip which ended prior to the injury to his left wrist, and his last trip, on which he sustained his permanent disability, except for the notification by the steamship line to report for the April 22, 1963 trip (E. 77).

ARGUMENT

The Supreme Court Has No Jurisdiction To Grant a Petition for Writ of Certiorari,

(1) Where No Federal Question Was Presented or Passed on Below Until the Motion for Reargument

(a) Was Filed After Decision of the Appeal to the Highest Maryland Court,

(b) And Was Denied Without Opinion or Further Hearing;

(2) Where Resolution of the Federal Question Then Set Forth Was Entirely Unnecessary to the Maryland Decision and Was Never Passed on;

(3) And Where the Presentation of the Same Question, Whatever Its Legal or Factual Basis, Could Have Been Made at the Jury Trial, at a Motion for New Trial or Motion for Judgment Non Obstante Verdicto, or Even on Appeal Prior to Decision by the Highest Maryland Court.

Prior to the appearance in print of petitioner's petition here in this Court, the entire history of the record of this case, insofar as there is any mention by petitioner, respondent, the trial court or the highest court of Maryland, of any Federal question, is that contained at pages 15 and 16 of petitioner's Motion for Re-Argument before the Court of Appeals of Maryland and it is set forth in its entirety here:

> "K. The Court erred in that, in effect, its opinion, considered the contract that might have been made between the appellant and appellee rather than the contract that was actually entered into between the parties, and thus impaired the obligation of contract in violation of due process.
>
> It is submitted that it is fundamental that the Court may not consider any contract other than the one before it. While recognizing that any ambiguity in an insurance contract will be resolved against the insurer and in favor of the insured, in the instant case, it is undisputed that the appellee applied for Plan B coverage in his application and his then freedom from physical impairment and disease was necessary in order for him to be eligible

> for the coverage requested. Applicant was, at the time and for some two months after, carried in a not fit for duty status. Additionally, he was drawing disability compensation and had been doing so for almost twenty years. For the Court to consider a contract that might have been entered into between the parties, but was not, would amount, it is submitted, to judicial impairment of the contract that was under consideration and is in violation of the due process clause of the Constitution of the United States."

Three comments are in order concerning this passage in the motion:

1. Respondent is unaware of what contract other than the one at issue was considered by the Maryland Court of Appeals.

2. The Maryland Court of Appeals reference to directing a verdict in favor of the insured (respondent) under Plan C was clearly dicta, and may be found to be so by a simple reading of the paragraph in which that comment is contained (petition, Appendix A, pages 27-28).

3. The sole reference to a constitutional question in the courts below came in a Motion for Re-Argument which was denied without opinion or hearing.

It is well established law in the Supreme Court of the United States that a petition for a writ of certiorari to review a judgment of a State Court will be denied where the Federal claim was first raised by a petition for re-hearing of a decision on appeal to the highest court of the state, except where the opportunity to make the Federal claim did not exist prior to the decision of such court, or where the Federal question was actually decided on re-hearing. Absent the two exceptions, the Supreme Court is without jurisdiction to grant a petition for writ of certiorari. *American Surety Company v. Baldwin*, 287 U.S. 156, 77 L. ed. 231, 53 S.Ct. 98 (1932); *Great Northern Railway Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 77 L.

ed. 360, 53 S.Ct. 145 (1932); *Herndon v. Gee,* 295 U.S. 441, 79 L.ed. 1530, 55 S.Ct. 794 (1935); *Radio Station WOW v. Johnson,* 326 U.S. 120, 89 L.ed. 2092, 65 S.Ct. 1475 (1945).

There is absolutely nothing in the Maryland Court of Appeals opinion which reconstrued Maryland's law or any other law giving a new light to that law which would give rise to a Federal question which was not presented before. Petitioner's allegation, in his petition topic entitled "How Federal Questions are Presented", that the decision of the highest state court affirming a lower court was completely unexpected and unanticipated, is not supported by the record. As a matter of fact, affirmance of a lower court judgment based on a jury verdict would seem to be the expected result. Furthermore, the decision which followed petitioner's insertion of a Federal question allegation was the decision to deny the motion for re-argument after the highest state court had decided the appeal. Certainly the denial of that motion could not be thought to be "completely unexpected and unanticipated".

From an examination of the motion for re-argument and the questions presented and argument in support of those questions presented in petitioner's petition, it is evident that only Question No. 5 presented in support of the petition deals with matter in any way related to that allegation in the motion for re-argument. As already contended, respondent contends that petitioner was too late in raising that question.

As to Questions Presented numbered 1, 2, and 3, it is perfectly obvious that there is nothing in any of the courts below raising those questions, and each of them is presented for the first time in this court.

It is essential to the jurisdiction of the Supreme Court on certiorari to a State Court that it appear affirmatively from the record not only that a Federal question was presented for decision in that court, but also that its decision of the Fed-

eral question was necessary to the determination of the cause, and that the question was actually decided or that the judgment as rendered could not have been rendered without deciding it. *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 2, 84 L. ed. 536, 60 S. Ct. 375, vacated on re-hearing in 309 U.S. 692, 84 L. ed. 1034, 60 S. Ct. 512; *Black v. Cutter Labs*, 351 U.S. 292, 100 L. ed. 1188, 76 S. Ct. 825; *Durley v. Mayo*, 351 U.S. 277, 100 L. ed. 1178, 76 S. Ct. 806; *Lynch v. New York*, 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16.

Jurisdiction of the Supreme Court on certiorari cannot be founded on surmise as to what, if any, Federal question the state court rested its opinion and decision upon, nor can a claim of jurisdiction be sustained by reference to briefs or statements which are not part of the record. *Lynch v. New York, supra.*

Finally, Question Presented No. 4 asks the Supreme Court to pass on an interpretation of the Maryland State Constitution which does not fall within the jurisdiction invoked under 28 U.S.C. Section 1257 (3), and therefore falls outside the jurisdiction invoked by the petitioner.

And so the closest that the petitioner has come to raising a Federal question below was in a motion for re-argument before the highest state court. All of the other questions are either outside the jurisdiction petitioner himself invokes, or are raised here for the first time. This Court's precedent makes it entirely clear, therefore, that questions raised here for the first time are outside the jurisdiction of the Supreme Court. Coupling that together with one question raised here which is outside of the jurisdiction which even the petitioner invokes, and finally putting that together with a question raised for the first time on motion for re-argument which could have been raised earlier, and which was never passed on anyway in the lower court, this appears to be a petition for a writ of certiorari, jurisdiction for which the Supreme Court of the United States does not have.

II

Assuming Arguendo That the Supreme Court Has Jurisdiction To Grant Certiorari, Certiorari Should Be Denied Where the Judgment of the Trial Court Was Completely Supported by the Record in Accordance With the Established Maryland Common Law and Statutory Law, None of Which Is Here Attacked, Constitutionally or Otherwise

A simple reading of the facts of this case, as summarized in the Maryland Court of Appeals Opinion, with the addition added in respondent's statement of the case, respondent contends, makes it entirely clear that the decision of the jury, the order entered thereon, and the decision of the Maryland Court of Appeals was completely supported by the record in accordance with established Maryland common law and statutory law. Petitioner does not attack the Maryland statutory law, nor does he attack any of the cases decided as part of the body of common law in Maryland. Instead, he makes repeated reference to the facts of the case and asserts that no factual issues are presented, time and again ignoring portions of the testimony which are damaging to his side of the case, and which the Court of Appeals very aptly summarized in its Opinion.

CONCLUSION

Wherefore, respondent respectfully submits that the petition for a writ of certiorari to the Court of Appeals of Maryland be denied.

Respectfully submitted,

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JERROLD V. POWERS

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Upper Marlboro, Maryland

Counsel for Respondent

APPENDIX I

ADDENDA TO JOINT RECORD EXTRACT

At page E. 32, after line 3 and before the three stars, the following should be included:

"Question: They did not give you a specific time to return for further treatment at that time?

Answer: Not that I remember, no."

At page E. 34, after the three stars and before the words "Mr. Freeman", six lines from the bottom of the page, the following should be inserted:

"MR. MANN: I will stipulate.

THE COURT: 365 days.

MR. MANN: Yes sir, 365 days from the date he is totally disabled, as defined in the policy."

At page E. 42, the last six lines beginning with "MR. MANN" should be omitted and replaced with three stars.

At page E. 64, at the bottom of the page immediately preceding the three stars, the following should be inserted:

"Answer: A few days later. I don't know the exact date."